

FILED

JUN 23 2004

Division of Consumer Affairs

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DIVISION OF LAW
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SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY: CHANCERY DIVISION
DOCKET NO. MON-C-205-03

PETER C. HARVEY,
Attorney General
of THE STATE OF NEW JERSEY
and RENI ERDOS, Director,
New Jersey Division of
Consumer Affairs

Plaintiffs,

vs.

CYTODYNE TECHNOLOGIES, INC.
(a New Jersey Corporation)
et al.

Defendants.

SETTLEMENT AGREEMENT

WHEREAS, PETER C. HARVEY, the Attorney General of the State of New Jersey and RENI ERDOS, the Director of the Division of Consumer Affairs (collectively, the "State"), have brought claims against DANIEL E. FOX, M.D., ("Dr. Fox") in the above-captioned action (the "Action") that allege violations of N.J.S.A. 56:8-1, et seq. (the "Consumer Fraud Act") in connection with his agreement to provide a testimonial for a product called Xenadrine RFA-1;

WHEREAS, the State and Dr. Fox wish to settle the claims against Dr. Fox pursuant to the terms of this Settlement Agreement (the "Settlement Agreement");

NOW, THEREFORE, it is on this 23rd day of ~~May~~ ^{June} 2004,

AGREED as follows:

1. Dr. Fox does not admit to any violations of the Consumer Fraud Act.

2. Doctor Fox agrees that by entering into this Settlement Agreement he will not take any action to oppose an application by the State for the Court to prepare and submit for publication a decision in support of its October 24, 2003 order denying his motion to dismiss the claims alleged against him for failure to state a claim;

3. Doctor Fox agrees to cooperate with the State in the prosecution of its action against Cytodyne Technologies, Inc., Robert Chinery and any other agent or employee of Cytodyne Technologies, Inc. (collectively, the "Cytodyne Defendants") by:

- not moving to quash a subpoena to appear as a witness for the State;
- not moving to quash a subpoena by the State to provide non-privileged documents that relate to the testimonial that he provided to Cytodyne Technologies, Inc. that are in his possession and control;
- making himself available, at the State's request, to work with his attorney to submit certifications in this Action, give testimony in a deposition in this Action, or give testimony at the trial in

this Action on the topics set forth in paragraph 4 below;

- giving the State notice and an opportunity to review the testimony he intends to provide on the topics set forth in paragraph 4 before the testimony is introduced into evidence; and
- agreeing to refrain from discussing the case, individually or through counsel, with the Cytodyne Defendants or any person he reasonably believes is acting on behalf of the Cytodyne Defendants unless the discussion is pursuant to a subpoena or other order of a court.

4. Doctor Fox agrees to provide testimony on the following topics that is consistent with his deposition testimony:

- the circumstances under which Kelly Conklin approached him to provide a testimonial;
- any representations Conklin made about the safety or efficacy of Xenadrine RFA-1;
- the circumstances relating to the preparation or negotiation of the contract he eventually signed with Cytodyne;
- his understanding of whether Cytodyne would provide him with new information relating to the safety or efficacy of Xenadrine RFA-1 as it became available;
- what information Cytodyne subsequently provided him concerning the safety or efficacy of RFA-1; and
- what information Cytodyne subsequently provided him about the use of his testimonial in advertisements for RFA-1 and whether he consented to the subsequent uses of his testimonial.

5. The State will make every reasonable effort to permit Dr. Fox to satisfy his obligation to cooperate with the State's prosecution of its action against the Cytodyne Defendants in a way that is consistent with his obligations to his patients.

6. Doctor Fox agrees to pay \$16,500 to the New Jersey Division of Consumer Affairs for (a) administrative and investigative costs (\$500), (b) costs associated with commencing this action against him, opposing his motion to dismiss and negotiating the Settlement Agreement (\$1,000), and (c) consumer education and other consumer initiatives (\$15,000). An initial payment of \$8,250 shall be made when Dr. Fox executes the Settlement Agreement and a final payment of \$8,250 shall be made on or before ^{July 01} ~~June 5~~, 2004. In each case, payment shall be made by guaranteed funds such as a wire transfer, certified check, or money order.

7. Doctor Fox agrees to refrain from providing any testimonial for a commercial product that purports to be based on his credentials as a medical doctor unless he has a scientific basis for the statements in the testimonial. In addition, Dr. Fox agrees that for a period of two years from the date of the Settlement Agreement, he will provide the State with a copy of any agreement he enters into to provide a testimonial for a commercial product that is based on his credentials as a medical doctor.

8. If the State commences an action for breach of this settlement agreement and prevails, then it will be entitled to its costs and attorney's fees.

9. The Division of Consumer Affairs releases Doctor Fox from all claims alleged against him in the Action and any other claims it have might have had against him relating to advertisements for Xenadrine RFA-1 or any other Cytodyne product.

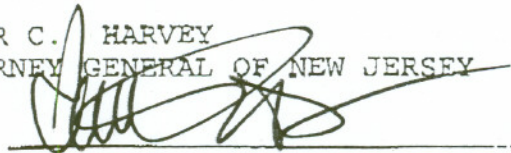
10. All notices to the State required by the Settlement Agreement shall be made to Joshua T. Rabinowitz, DAG, Division of Law and Public Safety, 124 Halsey Street, P.O. Box 45029, Newark, New Jersey, 07101.

11. This Settlement Agreement is the entire agreement between the State and Dr. Fox with respect to the subject matter of the agreement.

12. Any amendment to the Settlement Agreement must be in writing and signed by the State and Dr. Fox.

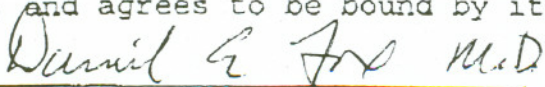
13. The parties acknowledge that for the purpose of enforcing the Settlement Agreement, New Jersey law shall govern the terms and provisions herein.

PETER C. HARVEY
ATTORNEY GENERAL OF NEW JERSEY

BY: 
Reni Erdos, Director New Jersey
Division of Consumer Affairs

6/23/04
DATED: May 2004

The undersigned has read this Settlement Agreement, understands it, and agrees to be bound by its terms.


Daniel E. Fox, M.D.

DATED: May 2004
6/17/04